FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: January 26, 2005

SUBJECT: COMMENT: DRAFT AO 2004-45

Transmitted herewith is a timely submitted comment by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics regarding the above-captioned matter.

Proposed Advisory Opinion 2004-45 is on the agenda for Thursday, January 27, 2005.

Attachment

By Electronic Mail

January 26, 2005

Mr. Lawrence Norton, Esquire
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comment on Draft AO 2004-45

Dear Mr. Norton:

We are writing on behalf of the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics to comment on Draft A.O. 2004-45, a draft response to an advisory opinion request on behalf of Senator Ken Salazar and his principal campaign committee, Salazar for Senate (the "Salazar Committee").

The Salazar Committee poses the question of whether it may use a last-in, first-out ("LIFO") method of accounting to determine whether contributions raised during the 2004 election cycle under increased contribution limits pursuant to the Millionaires' Amendment constitute "excess" contributions that must be returned to contributors.

The general counsel's draft response concludes that the Salazar Committee *may* use the LIFO method of accounting for this purpose. This conclusion is legally incorrect and violates congressional intent. The benefit provided by the Millionaires' Amendment is intended to help a candidate running against a wealthy opponent *in that election*. The practical effect of the general counsel's proposed answer, however, is to allow candidates to transfer the benefit of the Millionaires' Amendment into the *next election*, where the money raised under the increased contribution limits could be used in a race against a non-wealthy opponent. This distorts and undermines the purpose of the law.

A proper construction of the law, including its refund provision, would be that a committee that has benefited from the Millionaires' Amendment by raising contributions under increased contribution limits should treat all of its cash-on-hand after the election as "excess" funds, up to the aggregate amount of funds raised by the committee under the increased contribution limits. The law then requires this "excess" amount to be refunded to the contributors. 2 U.S.C. §§ 441a(i)(3) and 441a-1(a)(4). *See also* 11 C.F.R. § 400.53. The Commission should prohibit the use of any method of accounting – including the LIFO

method – which would allow funds in the possession of a committee as a direct result of the Millionaires' Amendment to be carried over to a future election.

Discussion

For more than 30 years, federal law has imposed limits on contributions to candidates in order to advance the government's compelling interest in avoiding real and apparent corruption. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 26 (1976). The Millionaires' Amendment is the *only* exception to the generally-applicable contribution limits—and the exception is a narrow one.

The Millionaires' Amendment was first introduced in the Senate in 2001 as an amendment to the Bipartisan Campaign Reform Act. Senator DeWine, a principal co-sponsor of the amendment, explained the intent of the provision:

> The basic intent of our amendment is to preserve and to enhance the marketplace of ideas—the very foundation of our democracy—but giving candidates who are not independently wealthy an opportunity to get their message across to the voters as well.
>
> Specifically, our amendment would raise the contribution limits for candidates facing wealthy opponents to fund their own campaigns.

147 Cong. Rec. S2538 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine).

Congress eventually adopted a complex formula, based on the voting age population, to determine when and to what extent a congressional candidate's contribution limit is increased as the result of a self-financed wealthy opponent's spending. 2 U.S.C. §§ 441a(i) (for Senate candidates) and 441a-1 (for House candidates). Again, these Millionaires' Amendment provisions are the *only* exception to the candidate contribution limits found in 2 U.S.C. § 441a(a).

Congressional intent that the funds raised pursuant to the Millionaires' Amendment not be used in a future election is evident from the Senate floor debate on the issue. Senator Domenici, the principal sponsor of the amendment, made this point plainly:

> We take a lot of the caps off so the nonwealthy candidate, the mere mortal, can have a chance at raising significant money to run against a multimillionaire candidate. But we say if that candidate who had the caps raised so they can accommodate – *if they have money left over from their campaign, they have to return it to the people from whence they got it.* In other words, *they cannot raise more than they need and hold it for another campaign.* Whatever they use in that campaign, fine; what they don't, they have to return.

147 Cong.Rec. S2461 (daily ed. March 19, 2001) (emphasis added). Speaking in support of the Amendment, Senator Sessions specifically praised the its "give-back" provision, noting that "any excess funds raised by the opponent of a wealthy candidate may be used *only in the election cycle for which they were raised.*" *Id.* at S2465 (statement of Sen. Sessions) (emphasis added).

To this end, the statute requires that "the aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit [of the Millionaires' Amendment] . . . and not otherwise expended in connection with the election with respect to which such contributions relate" be returned to the person who made the contribution not later than 50 days after the date of such election. 2 U.S.C. §§ 441a(i)(3) and 441a-1(a)(4)(A). *See also* 11 C.F.R. § 400.53.

The plain meaning of the statute is that *all* of a candidate's leftover funds, up to the aggregate total raised under the increased limits, are excess contributions which must be returned to contributors. Nothing in the statutory language or legislative history suggests that Congress intended for accounting methods to be employed to reach the contrary result that leftover funds (where such funds are less than the aggregate amount raised under the increased contribution limits) need not be returned to contributors.

It is certainly not sensible to suppose that Senator Domenici was contemplating that LIFO accounting could be used to completely frustrate the straightforward meaning of the statutory language, when he explained it as requiring candidates who raise funds under the increased contribution limits, and who have "money left over from their campaign," to return those funds "to the people from whence they got it." 147 Cong.Rec. S2461. In other words, as he said, "they cannot raise more than they need and hold it for another campaign." *Id.*

This has been the position of the Commission as well. In the explanation to the interim final rules adopted to implement the Millionaires' Amendment, *see* 68 Fed. Reg. 3970 (Jan. 27, 2003) (Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates), the Commission said:

> The focus of the Millionaires' Amendment is on the fundraising ability of the candidate facing an opposing candidate who is self-financed. *The Commission concludes that nothing in BCRA suggests that once the election is over, the candidate should be able to carry over the benefit of the increased contribution limits into the next election where he or she would be opposing an entirely different candidate.* In addition, BCRA (2 U.S.C. 441a(i)(3) and 441a-1(a)(4)) provides for only one method of disposing of excess contributions and that is the refund of the excess contributions to the original contributors . . . .

68 Fed. Reg. at 3985 (emphasis added).

This is precisely right. A candidate should *not* be permitted to carry over the benefit of the increased contribution limit into the next election. But by permitting the Salazar

Committee to use the LIFO method of accounting, the Commission would explicitly be enabling a candidate to do so. As the Commission has acknowledged, this would be inconsistent with the law and congressional intent of the Millionaires' Amendment.

Indeed, if the Commission in this advisory opinion authorizes LIFO accounting to be used, it will – as a practical matter – be writing the refund provision out of the statute. Any campaign that takes advantage of the Millionaires' Amendment will almost certainly spend more in total spending from the date the Millionaires' Amendment is first triggered in the campaign, than the aggregate amount it raises under the increased contribution limit in that same period. If all of the money raised under the increased limit can be first counted against that spending, which is what the LIFO method allows, then a committee will never end up with "excess" funds (within the meaning of the Millionaires' Amendment), even if concludes the campaign with substantial cash on hand. By this interpretation, the refund provision of the law will be a nullity. And candidates will be able to build up substantial "war chests" for their next election, using funds raised under $6,000 or even $12,000 contribution limits.

The Commission's regulations implementing the Millionaires' Amendment, and in particular, the refund requirement, are inconsistent with this position, and with the use of LIFO accounting.

For instance, the Commission adopted a regulation defining "excess contributions" as "contributions that are made under the increased limit[s of the Millionaires' Amendment] . . . *but not expended in connection with the election to which they relate*." 11 C.F.R. § 400.50 (emphasis added). According to the Commission, this definition allows candidates to retain the "benefit of contributions that they would have received regardless of whether the increased limit provisions of the Millionaires' Amendment were triggered." 68 Fed. Reg. at 3985. By implication, the Commission acknowledges that candidates are not permitted to retain after the election the benefit of those excess contributions received as a result of the Millionaires' Amendment.

The Commission also adopted a regulation reiterating the statutory requirement that excess contributions be returned to contributors within 50 days of the election for which they were raised. The Commission explained that the "purpose of new 11 C.F.R. 400.51 is to make clear that contributions accepted under the increased limit . . . *can only be spent for that election*." 68 Fed. Reg. at 3985 (emphasis added).

The Commission also adopted a regulation prohibiting a candidate's committee from redesignating or seeking redesignation of a contribution raised under the Millionaires' Amendment for another election, 11 C.F.R. § 400.52, concluding that Congress did not intend to allow contributions raised under the increased limits of the Millionaires' Amendment to be used in a future election against a different opponent. 68 Fed. Reg. at 3985.[1]

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[1] In addition, the Commission specified that no contributor may receive a refund that exceeds the amount of the individual's contribution and that the committee must deposit refunds not cashed by the contributor into the U.S. Treasury. 11 C.F.R. § 400.53. Finally, the Commission adopted a

The comprehensive nature of these implementing regulations suggest that the Commission took seriously the safeguards erected by Congress to prevent abuse of the Millionaires' Amendment, and to require the return of funds on hand that were raised under the provision. Allowing LIFO accounting undermines this intent.

The only justification offered in the draft advisory opinion in support of LIFO account is that it is "generally accepted." But the Commission's responsibility is to require the use of accounting procedures that best result in compliance with federal campaign finance laws. The Commission is under no obligation to allow the use of *any* "generally accepted" accounting principle, where doing so would undermine the law. The bare fact that a method of accounting may be "generally accepted" does not mean that it is acceptable in the specific context of best effectuating the purpose of the campaign finance law.

Conclusion

The Salazar Committee's use of the LIFO method of accounting would enable the committee to carry over the benefit of the Millionaires' Amendment to a future election. Use of the LIFO accounting method in this context would contravene the statutory requirement that funds raised pursuant to the Millionaires' Amendment, but not spent in connection with the election in which they were raised, be returned to contributors.

We urge the Commission to deny the Salazar Committee's request that it be permitted to use the LIFO method of accounting to determine whether contributions raised during the 2004 election cycle under the Millionaires' Amendment constitute excess contributions that must be returned to contributors. Instead, the Commission should advise that all post-election funds on hand, up to the aggregate amount of funds raised pursuant to the Millionaires' Amendment, should be deemed excess contributions and returned to the contributors. The Committee should return its excess contributions by making refunds either to those excess contributors who last contributed such funds, or by giving all excess contributors a proportional share of the excess funds.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
Fred Wertheimer Democracy 21	J. Gerald Hebert Campaign Legal Center	Lawrence M. Noble Center for Responsive Politics

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regulation implementing the FECA requirement that candidate committees report to the Commission the manner in which excess contributions were refunded / disposed. 11. C.F.R. § 400.54.

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